

(i) Participate in the major policy-making functions of the savings and loan holding company; or

(ii) Threaten the safety and soundness of any insured depository institution that is controlled by the savings and loan holding company, the interests of its depositors, or the public confidence in the insured depository institution.

(2) The Board will also consider whether the applicant has demonstrated the person's fitness to hold the described position. Some positions may be approved without an extensive review of a person's fitness because the position does not enable a person to take the actions described in paragraph (a)(1) of this section.

(b) *Factors.* In making the determinations under paragraph (a) of this section, the Board will consider the following factors:

(1) The position;

(2) The amount of influence and control a person holding the position will be able to exercise over the affairs and operations of the savings and loan holding company and the insured depository institution;

(3) The ability of the management of the savings and loan holding company to supervise and control the activities of a person holding the position;

(4) The level of ownership that the person will have at the savings and loan holding company;

(5) The specific nature and circumstances of the criminal offense. The question whether a person who was convicted of a crime or who agreed to enter into a pretrial diversion or similar program for a crime was guilty of that crime is not relevant;

(6) Evidence of rehabilitation; and

(7) Any other relevant factor.

#### § 238.89 Board action.

(a) *Approval.* The Board will notify an applicant if an application under this subpart is approved. An approval by the Board may include such conditions as the Board determines to be appropriate.

(b) *Denial.* If Board denies an application, the Board will notify an applicant promptly.

#### § 238.90 Hearings.

(a) *Hearing requests.* Within 20 days of the date of issuance of a denial of an application filed under this subpart, a savings and loan holding company or a person whose application the Board has denied may file a written request demonstrating good cause for a hearing on the denial.

(b) *Board review of hearing request.* The Board will review the hearing request to determine if the savings and loan holding company or person has demonstrated good cause for a hearing on the application. Within 30 days after the filing of a timely request for a hearing, the Board will notify the savings and loan holding company or person in writing of its decision to grant or deny the hearing request. If the Board grants the request for a hearing, it will order a hearing to be commenced within 60 days of the issuance of the notification. Upon the request of a party, the Board may at its discretion order a later hearing date.

(c) *Hearing procedures.* The following procedures apply to hearings under this subpart.

(1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Board.

(2) An applicant may elect in writing to have the matter determined on the basis of written submissions, rather than an oral hearing.

(3) The parties to the hearing are Enforcement Counsel and the applicant.

(4) The provisions of §§ 263.2, 263.4, 263.6 through 263.12, and 263.16 of this chapter apply to the hearing.

(5) Discovery is not permitted.

(6) A party may introduce relevant and material documents and make oral argument at the hearing.

(7) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses must be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party may cross-examine any witness presented by the opposing

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party. The Board will furnish a transcript of the proceedings upon an applicant's request and upon the payment of the costs of the transcript.

(8) The presiding officer has the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas *duces tecum*. If the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees are paid in accordance with section 263.14 of this chapter.

(9) Upon the request of a party, the record will remain open for five business days following the hearing for additional submissions to the record.

(10) Enforcement Counsel has the burden of proving a *prima facie* case that a person is prohibited from a position under section 19(e) of the FDIA. The applicant has the burden of proof on all other matters.

(11) The presiding officer must make recommendations to the Board, where possible, within 20 days after the last day for the parties to submit additions to the record.

(12) The presiding officer must forward his or her recommendation to the Board who shall promptly certify the entire record, including the presiding officer's recommendations. The Board's certification will close the record.

(d) *Decision*. After the certification of the record, the Board will notify the parties of its decision by issuing an order approving or denying the application.

(1) An approval order will require fidelity bond coverage for the position to the same extent as similar positions with the savings and loan holding company. The approval order may include such other conditions as may be appropriate.

(2) A denial order will include a summary of the relevant factors under § 238.88(b).

## 12 CFR Ch. II (1–1–12 Edition)

### Subpart J—Management Official Interlocks

#### § 238.91 Authority, purpose, and scope.

(a) *Authority*. This subpart is issued under the provisions of the Depository Institution Management Interlocks Act (Interlocks Act) (12 U.S.C. 3201 *et seq.*), as amended.

(b) *Purpose*. The purpose of the Interlocks Act and this subpart is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anti-competitive effect.

(c) *Scope*. This subpart applies to management officials of savings and loan holding companies, and their affiliates.

#### § 238.92 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Affiliate*. (1) The term *affiliate* has the meaning given in section 202 of the Interlocks Act (12 U.S.C. 3201). For purposes of that section 202, shares held by an individual include shares held by members of his or her immediate family. “Immediate family” means spouse, mother, father, child, grandchild, sister, brother, or any of their spouses, whether or not any of their shares are held in trust.

(2) For purposes of section 202(3)(B) of the Interlocks Act (12 U.S.C. 3201(3)(B)), an affiliate relationship involving a savings and loan holding company based on common ownership does not exist if the Board determines, after giving the affected persons the opportunity to respond, that the asserted affiliation was established in order to avoid the prohibitions of the Interlocks Act and does not represent a true commonality of interest between the depository organizations. In making this determination, the Board considers, among other things, whether a person, including members of his or her immediate family, whose shares are necessary to constitute the group owns a nominal percentage of the shares of one of the organizations and the percentage is substantially disproportionate to that person's ownership of shares in the other organization.